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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re P.S., et al., Persons Coming Under the Juvenile Court Law.	B210478 (Super. Ct. No. CK57909)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.V., Sr., Defendant and Appellant.	
In re T.V., et al., Persons Coming Under the Juvenile Court Law.	B210545 (Super. Ct. No. CK71364)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.V., Sr., Defendant and Appellant.	

APPEALS from orders of the Los Angeles County Superior Court, Juvenile Division, Marguerite Downing, Judge. Reversed and remanded with directions.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Timothy M. O'Crowley, Deputy County Counsel, for Plaintiff and Respondent.

In companion cases, a father appeals from: (1) a dispositional order requiring him to participate in a drug rehabilitation program with random testing, (2) a jurisdictional finding that his son was at risk of physical and/or sexual abuse, and (3) orders that the Indian Child Welfare Act (25 U.S.C. § 1901, et seq. (ICWA)), did not apply in either case. We reverse on a limited basis and remand with instructions for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

These appeals, consolidated solely for purposes of discussion, involve appellant, T.V., Sr. (Father), and his daughter, D.V. (born June 1994), and his son and D.V.'s half-brother, T.V., Jr. (T.V.; born October 1999). Separate petitions were filed as to each child under Welfare and Institutions Code section 300, subdivisions (b) and (d),[1] in January 2008, after Father was accused of sexually molesting D.V. and her minor cousin, S.S., and physically abusing T.V.[2]

According to the police and detention reports submitted by respondent Department of Children and Family Services (DCFS), D.V. lived with her mother, aunt, sister P.S., and cousin S.S. However, for a short time in late 2007 and early 2008, she lived with Father. One day during that period, Father offered 17-year-old S.S. a ride to school,

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] D.V. and her sister, P.S., were subjects of the same petition, but P.S. is not a subject of an appeal. The children's mothers are not parties to these appeals.

which she accepted. S.S. was not concerned; Father was her aunt's ex-boyfriend, and she had known him all her life. Father asked S.S. if she wanted to stop on the way and see the bedroom D.V. shared with T.V.; S.S. agreed.

Once they were in D.V.'s bedroom, Father pushed S.S. onto the bed and held her down, telling her he wanted to kiss her. When S.S. turned away, Father pulled her toward him, yanking her hair and chin. He pulled down her shirt, and kissed and licked her breasts. S.S. began to scream and cry for help. Father threatened to smother her with a pillow if she did not quiet down. He then removed her pants. He orally copulated S.S., digitally penetrated her vagina and threatened to rape her. Later, S.S. tried to escape by running out the front door, wearing only her shirt. Father ran after her, grabbed her, and pulled her back into his apartment. He was very angry and threatened to "call his homeboys and have them come over if [S.S.] did not behave." Afraid, S.S. ceased struggling with Father, who gave her back her pants. He then had S.S. drink some beer, and smoke some of the marijuana he was smoking. S.S. told Father she needed to go to school; he said she was staying with him. Later, Father asked S.S. to take a shower with him. She refused. He asked her to wash his back, and she agreed because she was afraid, confused and wanted him to leave her alone. After a while, Father drove S.S. to work. When she got home, S.S. told her mother what had happened and her mother called the police. S.S. also talked to D.V., who said Father had done the same thing to her. A sexual assault examination of S.S. revealed a suction mark on her neck, and a vulva tender to touch.

S.S.'s mother told the police D.V. had also been sexually abused, and she believed D.V.'s mother knew about it. However, there were allegations that, because of her own substance abuse problems, and a desire to use the information to extort money from Father, D.V.'s mother never reported the molestation to the police.

The police interviewed D.V. She disclosed that one day in December 2007, while she was living at Father's house, he kept her home from school. He took her into the bathroom and showed her some bullets. Father told D.V. he had "had a bullet" for her, one for S.S. and one for another relative. Afterward, Father pulled her pants down. As

he did, Father told D.V. he would get a pillow with which he was "going to kill [her]." He put a pillow over her face and placed his hands around her neck. D.V. turned her head to the side, but found it hard to breath. She tried to escape from Father, but fell to the ground. Father kept his hands around her neck. Father orally copulated D.V. When he was done, Father asked D.V., "Is it wrong that I love you and that I want to make you feel good?"

D.V.'s mother was interviewed. D.V. was sent to live with Father in late 2007 when her mother was incarcerated for a probation violation. When DCFS learned D.V.'s mother may have known about D.V.'s sexual molestation and, rather than reporting it to the police, used the information to extort money from Father and his wife, J.S., D.V., P.S. and T.V. were taken into protective custody. D.V. was placed in shelter care, but T.V. was permitted to remain in his mother's care, so long as Father was out of the house and did not visit.

Eight-year-old T.V. told police he lived with his mother and Father. He had a good relationship with his parents. T.V. said that, when Father disciplines him, he "takes stuff away and he yells at [T.V.]"

A criminal history report for Father revealed a lengthy history of criminal activity. It includes a number of felony convictions, including multiple convictions for child cruelty and inflicting corporal injury on a spouse, being a felon in possession of a firearm, and faking a workers' compensation claim, as well as arrests for possession of narcotics, burglary, robbery, kidnapping, vehicle theft, carrying a concealed weapon in a vehicle, parole violations and misdemeanor convictions for disturbing the peace.

The detention hearing was conducted on January 22, 2008. Both children's mothers appeared, but Father did not. Both mothers indicated they might have Native American (Cherokee) ancestry, and DCFS was ordered to notify the Cherokee Tribes, the Bureau of Indian Affairs (BIA), and the Secretary of Interior pursuant to the ICWA.

A combined jurisdictional/dispositional hearing was held on February 26, 2008. In a report for that hearing, DCFS informed the juvenile court both D.V. and S.S. had reaffirmed the accuracy and details of their accounts of Father's molestations, and that

T.V.'s mother, who was now in the process of divorcing Father, believed the girls had told the truth.

T.V. was interviewed for the report. He told DCFS that Father sometimes hit him with a belt when he misbehaved, like when he made too much noise and bothered Father. He said Father did not hit him often or very hard during such incidents. T.V. said Father hit him on the buttocks and did not leave marks on his body. Such discipline was usually meted out when J.S. was at work. The child did recall that J.S. was home once or twice when T.V.'s father struck him with a belt, although he could not remember whether he had been hit in her presence or not. J.S. believed T.V., but had never seen Father strike her son with a belt. She would have stopped him immediately if she had.

Father's whereabouts were unknown at the time of the hearing. DCFS reported that a warrant for Father's arrest was outstanding for sexual abuse of D.V. and S.S.

Father made his first appearance (in the custody of the Sheriff's Department) on April 30, 2008. At that time he indicated he might have Cherokee ancestry, and DCFS was ordered to investigate. Father's attorney asked that DCFS not contact Father about the allegations of the case. The juvenile court agreed, and ordered DCFS "not [to] interview Father without [his] counsel being present." The jurisdictional hearing was continued to June.

In its interim report for the jurisdictional hearing, DCFS noted J.S. had indicated she might have Native American ancestry through her deceased mother, but that she did not know her mother's date of birth, had not had contact with her maternal family for over 20 years, and did not know any relative to contact about her possible Indian heritage. DCFS was not able to interview Father about his possible Indian ancestry because he was incarcerated, and the court had ordered DCFS not to contact him unless counsel was present. DCFS did talk to J.S., who said Father had never said, and she did not believe, he had any Indian heritage on his side of the family. J.S. was unwilling to provide DCFS contact information for Father's family members.

Both children's mothers and Father were present at the jurisdictional hearing on June 24, 2008. With respect to D.V., the court observed that no inquiries had yet been

made under the ICWA, and the matter was continued to permit DCFS to provide notice. As for T.V., county counsel noted that J.S. had indicated she might have Indian ancestry, but that DCFS had investigated, uncovered no additional information, and that no notices had been sent. He requested the court make a finding "either way," to permit the parties to move forward. In response, the juvenile court noted, based on J.S.'s representations to DCFS, that it had no reason to believe T.V. was an Indian child. County counsel observed that no objections were raised, and stated its assumption that any objections were waived. Father's counsel responded, "that's correct," as did the juvenile court, which then proceeded to the adjudication.

The allegations of the petition related to Father's treatment of T.V. were sustained, as amended, to state that "on prior occasions," Father had "inappropriately disciplined [T.V.] with a belt." In addition, the court acknowledged that, because T.V. was not the same gender as D.V. and S.S., he was arguably not subject to sexual molestation by Father. Nonetheless, the court was convinced T.V. remained at risk because of Father's threats to smother the girls with pillows, and the possibility he could become overcome with anger and subject T.V. to inappropriate discipline and anger. As a result, the court found T.V. was a person subject to juvenile court jurisdiction, under section 300, subdivisions (b), (d) and (j).

The disposition hearing was conducted in August 2008. The court addressed the ICWA notice at the outset of the hearing, noting it had received the "green cards" required under the ICWA, and found no basis to conclude the ICWA applied as to either child.

With respect to T.V., the court ordered family maintenance services for J.S., and family reunification services for Father, to include parenting classes, sex abuse counseling and individual counseling addressed to case-related issues. The court denied Father any visitation with T.V. The court ordered that T.V. remain placed with his mother.

The court ordered that D.V. be placed in foster care, and ordered family reunification services for Father, to include his participation in a drug rehabilitation

program with random testing, parenting education, sex abuse counseling and an individual counseling program addressed to case-related issues. D.V. was placed in foster care. These appeals followed.

DISCUSSION

1. The record contains sufficient evidence to support the jurisdictional finding that T.V. was at risk of serious physical harm and/or sexual abuse.

In count (b)(3) of the sustained petition, the juvenile court found that, on prior occasions, Father "inappropriately discipline[d] [T.V.] . . . with a belt as a routine method of discipline." The court found that "[s]uch punishment was excessive and caused [T.V.] unreasonable pain and suffering. Such conduct by [Father] endangers [T.V.'s] physical and emotional health and safety and places the child at risk of serious harm."

To substantiate a jurisdictional finding under section 300, subdivision (b), the court must find neglectful conduct by the parent, causation, and serious physical harm or illness to the child, or the substantial risk of such harm. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) The determination as to whether a child is at risk of harm is made based on the circumstances at the time of the hearing, where "'[t]here must be some reason to believe the [abusive] acts may continue in the future.'" (*Id.* at p. 824.)

Father maintains the juvenile court's finding is unsupported because T.V. had no cuts or bruises when he was interviewed in January 2008. In addition, T.V., who was eight years old when interviewed, and probably about four months into his third grade term, also said Father hadn't hit him with a belt since he had been in second grade. T.V. said Father usually hit him when his mother was at work, and never hit him many times or very hard.

Father's brief ignores completely the evidence of his other, far more violent conduct. To wit: he threatened his daughter with a bullet, telling her he had bullets for her and other members of her family. Then, as he had done with S.S., Father threatened to kill D.V., trying to smother her with a pillow and wring her neck. He also ignores his history of violent crime, which includes convictions for kidnapping, inflicting corporal injury on a spouse and multiple convictions for child cruelty. Against this backdrop, we

have no difficulty concluding the record supports the juvenile court's finding that Father's current and historical conduct placed T.V. at substantial risk of harm.[3]

2. Father's reunification services may properly include participation in a drug rehabilitation program.

Father argues the juvenile court's dispositional order in D.V.'s case, which requires that he participate in a drug rehabilitation program and random testing, was an abuse of discretion because there was no sustained allegation of drug abuse. We agree the record contains sparse evidence of Father's substance abuse. However, we cannot agree that evidence was nonexistent or that the juvenile court lacked a basis for concluding that Father and his family may benefit from his participation in such a program.

Once a child is made a dependent of the juvenile court, family reunification is a primary goal of the proceeding. (§ 361.5, subd. (a).) The reunification plan "'must be appropriate for each family and be based on the unique facts relating to that family.'" (*In re Michael S.* (1987) 188 Cal.App.3d 1448, 1458.) "'The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the minor is a person described by Section 300.'" (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 172 (*Basilio T.*).)

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[3] We need not address Father's assertion that there is insufficient evidence to support the jurisdictional finding that T.V. was at risk of sexual abuse because he is a male and there is no evidence he was at risk of molestation. If the evidence is sufficient to substantiate any subdivision of section 300, juvenile court jurisdiction is established. (*In re Dirk S.* (1993) 14 Cal.App.4th 1037, 1045 ["Section 300, subdivisions (a) through (j), establishes several bases for dependency jurisdiction, and one of which is sufficient to establish jurisdiction."].) In any event, aberrant sexual behavior by a parent—here Father's molestation of his 13-year-old daughter—may place the victim's sibling who remains in the home at risk of sexual abuse, regardless of his or her gender. (*In re P.A.* (2006) 144 Cal.App.4th 1339, 1347; *In re Karen R.* (2001) 95 Cal.App.4th 84, 90–91.)

The dispositional order must be designed to offer services designed to remedy the specific problems that led to the loss of parental custody. It need not, however, be limited to those conditions. (*In re Christopher H*. (1996) 50 Cal.App.4th 1001, 1008.) If "the court is aware of other deficiencies that impede the parent's ability to reunify with his child, the court may address them in the reunification plan." (*Ibid*.) The juvenile court's broad discretion to fashion dispositional orders includes discretion to address any known deficiencies harmful to the well-being of a child, even if they are not related to the specific reasons which brought the child before the court. (*Ibid*.) We will not reverse a juvenile court's determination of an appropriate disposition absent a clear abuse of discretion. (*Id*. at p. 1006; *In re Sergio C*. (1999) 70 Cal.App.4th 957, 960 (*Sergio C*.).)

Father relies on *Sergio C*., *supra*, 70 Cal.App.4th 957, and *Basilio T.*, *supra*, 4 Cal.App.4th 155, to support his contention that the drug program component of the case plan was inappropriate. In *Sergio C*., *supra*, 70 Cal.App.4th 957, the court reversed a juvenile court order requiring a father to undergo random drug testing, where the only evidence of drug use was an unsworn, uncorroborated allegation of a drug-addicted mother who had abandoned her children. In reaching that decision, the court stated it lacked confidence in the accuracy of DCFS' reports, noting the father had denied any involvement with drugs and cooperated completely with all court orders. (*Id*. at p. 960, & fn. 4.) In *Basilio T*., *supra*, 4 Cal.App.4th 155, the court reversed a drug testing order because there was no evidence of a substance abuse problem on the part of either parent, other than a social worker's observation that the mother's behavior was unusual. (*Id*. at pp. 172–173.)

This case is different. Dispositional orders are based on all evidence available to the juvenile court, not just that which supports the petition. (§ 358, subd (b); *In re Rodger H*. (1991) 228 Cal.App.3d 1174, 1183.) Here, the record shows that, after he molested 17-year-old S.S., Father insisted she drink beer and smoke marijuana with him, before he finished the marijuana. While this evidence of substance abuse is not

overwhelming, it must be viewed in light of Father's criminal history, which includes more than one arrest for possession of narcotics.[4] Taken together, this evidence was sufficient to support the juvenile court's conclusion that a substance abuse program was a reasonable and useful component of Father's reunification services package. Once the juvenile court is aware of parental deficiencies posing impediments to family reunification, it is remiss if its case plan fails to address those deficiencies. (See *In re Christopher H.*, *supra*, 50 Cal.App.4th at pp. 1007–1008.)

3. ICWA notice was not proper.

a. T.V.

Father maintains there is no basis for the juvenile court's finding that the ICWA does not apply. DCFS asserts the finding was correct because no notice under ICWA was necessary in the first place and, even if it was, its failure to do so was harmless error as there was no risk it would break up an Indian home.

DCFS relies on *In re Alexis H.* (2005) 132 Cal.App.4th 11 to support its assertion that ICWA notice was not required because T.V. was not detained from his mother's care, and DCFS was not seeking to have him placed in foster care. In *In re Alexis H.*, relying on a Rule of Court since repealed, that court found failure to provide ICWA notice was harmless error where DCFS had not sought a foster care placement, or termination of parental rights. (*Id*. at pp. 15–16, citing Cal. Rules of Court, former rule 1439(b), repealed effective January 1, 2008.)[5] The current rules—in effect at times

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[4] Father contends his criminal drug history is irrelevant because the last date on which there was any evidence of drug involvement was in 1988. Not so. The record reflects that, after he sexually assaulted S.S. in January 2008, Father consumed alcohol and marijuana, and forced her to do so too.

[5] California Rules of Court, rule 1439(b) applied only to "proceedings under section 300 et seq. . . . in which the child [was] at risk of entering foster care or [was] in foster care, including detention hearings, jurisdiction hearings, disposition hearings, reviews, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child."

pertinent here—impose a broader duty to inquire whether a child is or may be an Indian child in any case in which DCFS seeks a "declaration freeing a child from the custody or control of *one or both* parents . . . ." (Cal. Rules of Court, rules 5.481(a), italics added, 5.480.) DCFS ignores this recent change in the Rules of Court. Moreover, DCFS inaccurately asserts the ICWA notice requirements do not apply because T.V. was never removed from the care of his custodial parent. This ignores the fact that, at the time the petition was filed, T.V. lived with both his parents.

Despite a court order to do so, DCFS failed to investigate Father's claimed Indian (Cherokee) ancestry, and did not comply with ICWA notice requirements. DCFS failed to question Father about his Native American heritage because the court ordered that Father not be questioned while incarcerated unless his attorney was present. But, there is no evidence DCFS made any effort to meet with Father and his attorney, or to route an ICWA inquiry through the attorney. There is also no indication DCFS made any effort to contact Father's paternal relatives to follow up on Father's claim of Indian ancestry, apart from asking J.S. for information about them, or to speak to them herself. Nor was any further inquiry made directly to Father, even though he attended several hearings between April and August 2008, including the two at which the juvenile court found the ICWA inapplicable.

Accordingly, a limited remand is required so that the juvenile court may fulfill its requirements under the ICWA. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.)

b. D.V.

Similar problems in D.V.'s case also require remand to permit DCFS to comply with the ICWA notice requirements. In D.V.'s case, DCFS did send out notices. However, as discussed above, the record contains no evidence that the juvenile court or DCFS made any meaningful effort to investigate Father's claim to Cherokee ancestry. Rather, DCFS merely mailed notices devoid of important information readily available in the court's file (including such basic facts as Father's mailing address and even his claim to Cherokee ancestry). It is essential that DCFS provide the tribes as much information as is known about a child's history, particularly his or her Native American ancestors.

(*In re Louis S.* (2004) 117 Cal.App.4th 622, 631.) Without such information, the tribe cannot conduct a meaningful search to determine the child's tribal heritage. (*Id.* at p. 630.) The forms prepared in D.V.'s case, which contain skeletal information, at best, do not fulfill DCFS duty under the ICWA. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703 [ICWA notice must include all available information about a child's parents and ancestors, including names, addresses, dates and places of birth and information about tribal affiliation].) In the absence of proper ICWA notice, the juvenile court erred when it found the ICWA inapplicable and proceeded to disposition.[6] (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 [failure of an ICWA notice to satisfy statutory requirements is prejudicial error].) Accordingly, limited remand is required for the purpose of compliance with ICWA notice requirements and a new determination as to whether the children are Indian children subject to the ICWA. (*Id.* at pp. 111–112.)

DISPOSITION

The juvenile court's jurisdictional order as to T.V., and its dispositional order as to D.V. (requiring Father to participate in a drug rehabilitation program with random testing), are conditionally reversed. The matter is remanded to the juvenile court with directions to proceed in compliance with the notice provisions of the ICWA and section 224.2. If, after proper notice, the court finds that D.V. and/or T.V. is an Indian child, the juvenile court shall proceed in accordance with the ICWA and section 224 et seq. If, however, the juvenile court finds that neither T.V. nor D.V. is an Indian child, the court shall reinstate the jurisdictional order as to T.V., and the dispositional order as to D.V.

NOT TO BE PUBLISHED.

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[6] DCFS is incorrect to the extent it implies Father's failure to object to the juvenile court's finding that the ICWA did not apply is a "tacit admission" that he agrees D.V. is not an Indian child, and is tantamount to a waiver of the right to raise the issue here. A challenge to compliance with ICWA notice requirements is not forfeited because a parent fails to object during juvenile court proceedings. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

WEISBERG, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.